No. 98-1013

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RAIZY LEVITIN, *et al.*,

Petitioners,

vs.

PAINEWEBBER, INC.,

Respondent.

LOUIS G. BISSELL, JR.,

Petitioner,

vs.

MERRILL LYNCH & COMPANY, INC., and
MERRILL LYNCH PIERCE, FENNER & SMITH, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Court grant certiorari on an issue of federal preemption when:

(1) petitioners do not contend that the court of appeals failed to state the law of preemption correctly, and can point to no conflict with the decision of another United States court of appeals or a state court of last resort on the same matter;

(2) the court of appeals correctly applied the law of preemption to the facts before it;

(3) in one of the two cases at issue, *Levitin v. PaineWebber*, an opinion by the Court would be purely advisory because it would not affect the dismissal of petitioner's federal claims below, and there is no independent basis of federal jurisdiction for petitioner's state law claims; and

(4) in the other of the two cases at issue, *Bissell v. Merrill Lynch*, any opinion also would be advisory because both the court of appeals and the district court, in rulings not challenged here, found that petitioner and respondent reached an agreement negating any right petitioner might otherwise have under U.C.C. § 9-207(2)(c), even if that provision of state law were *not* preempted?

STATEMENT PURSUANT TO RULE 29.6

The following are the parent companies or nonwholly owned subsidiaries of respondents:

The parent of respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is Merrill Lynch & Co., Inc. The only nonwholly owned subsidiary of Merrill Lynch, Pierce, Fenner & Smith Incorporated is Merrill Lynch Professional Clearing Corp.

The parent of respondent PaineWebber Incorporated (identified in the caption as "PaineWebber, Inc.") is Paine Webber Group Inc. There are no nonwholly owned subsidiaries of PaineWebber Incorporated.

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STATEMENT OF THE CASE

Petitioners' "Statement of the Facts" is materially incomplete.

Petitioners have filed a joint petition seeking a writ of certiorari to the United States Court of Appeals for the Second Circuit on two separate, but related cases — *Levitin v. PaineWebber, Inc.*, 159 F.3d 698 (2d Cir. 1998) ("*Levitin II*") (Pet. App. A), and *Bissell v. Merrill Lynch & Co.*, 157 F.3d 138 (2d Cir. 1998) ("*Bissell II*") (Pet. App. B). Although the cases were heard together on appeal and affirmed in essentially one opinion in *Levitin II*, the facts and procedural history of each case, which are not set forth in the petition, are relevant to the Court's consideration.

A. *Levitin v. PaineWebber*

Petitioner Levitin was a customer of PaineWebber who engaged in short sales. In 1995, Levitin filed a class action on behalf of herself and a putative class of other customers who conducted short sales through PaineWebber. The complaint alleged claims of fraud under Section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), as well as a variety of state law claims, including a claim that PaineWebber had violated New York's version of Section 9-207(2)(c) of the Uniform Commercial Code (the "UCC"), N.Y. [UCC] Law § 9-207(2)(c). The complaint's first and core contention was that PaineWebber had committed federal securities fraud by failing to notify its customers of its historical and regulated practice, in common with that of the entire brokerage industry, of retaining the interest and profits it earned on the collateral maintained on account in connection with customer short sales.[1] Secondarily, petitioner alleged that

1. In a regular short sale, the collateral consists of the proceeds of the short sale plus the additional margin required by federal regulation, exchange rules and house rules of the brokerage firm.

the retention of those earnings by PaineWebber constituted a violation of state law, including the UCC. The complaint alleged no facts supporting diversity jurisdiction.

Upon motion by PaineWebber under Fed. R. Civ. P. 12(b)(6), the district court dismissed the Section 10(b) claims, holding that the alleged fraud was not "in connection with" the purchase or sale of securities. The district court did not reach Levitin's UCC or other state law claims, but instead dismissed those claims for lack of any independent basis of original jurisdiction. *Levitin v. PaineWebber, Inc.*, 933 F. Supp. 325, 331, n.6. (S.D.N.Y. 1996) ("*Levitin I*") (Pet. App. 62a, n.6). Judgment was entered for PaineWebber, and Levitin appealed.

B. *Bissell v. Merrill Lynch*

Petitioner Bissell was a customer of Merrill Lynch who, like Levitin, also had engaged in short sales. In 1993, Bissell filed a class action, purportedly on behalf of himself and all similarly situated customers of Merrill Lynch, alleging a Section 10(b) claim and several state law claims, including a claim that Merrill Lynch's conduct violated U.C.C. § 9-207(2)(c). Bissell adequately alleged both federal question and diversity jurisdiction, providing a basis for the district court's jurisdiction over both his federal *and* state claims.

As in *Levitin*, Bissell's core allegation was that Merrill Lynch had unlawfully retained and, in violation of Section 10(b), failed to disclose its earnings on its use of the collateral in connection with customer short sales. Similarly, Bissell alleged that Merrill Lynch's conduct constituted violations of New York law, including U.C.C. § 9-207(2)(c). In *Bissell*, however, both the district court and the court of appeals found that Bissell actually had *otherwise agreed* with Merrill Lynch concerning the sharing of the earnings in question, negating

any claim under U.C.C. § 9-207(2)(c). *Bissell v. Merrill Lynch & Co.*, 937 F. Supp. 237, 248-49 (S.D.N.Y. 1996) ("*Bissell I*") (Pet. App. 47-48a); *Bissell II*, 157 F.3d at 138 (Pet. App. 23a).[2]

There is another difference between *Levitin* and *Bissell*. Unlike the "regular" short sales alleged in *Levitin*, the sales in *Bissell* were short sales "against the box". *See Bissell I*, 937 F. Supp. at 240-41 (Pet. App. 26-29a); *Bissell II*, 157 F.3d at 138. (Pet. App. 23a). In a short sale against the box, often a tax-driven transaction, the short seller owns at least an equal number of shares of the same stock issue (the "long position") that he sells short. *See Bissell I*, 937 F. Supp. at 240 (Pet. App. 26-27a). A short sale "against the box" is subject to different regulatory and margin requirements from those governing "regular" short sales. For example, a short sale "against the box" is deemed to be a long sale under Federal Reserve Board Regulation T and free of federal initial margin requirements. *See* 12 C.F.R. § 220.5(b)(2). However, as in a regular short sale, a short sale "against the box" requires the seller to borrow the stock from his brokerage firm for delivery to the buyer. That stock loan must be collateralized 100% in cash or cash equivalents. *See* Regulation T, 12 C.F.R. § 220.16.[3]

2. U.C.C. § 9-207(2)(c) provides:

> *Unless otherwise agreed*, when collateral is in the secured party's possession . . . the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation.

N.Y. [UCC] Law § 9-207(2)(c) (McKinney 1990) (emphasis added).

3. In a short sale "against the box," the collateral consists of the proceeds of the short sale and the short seller's long position "in the

(Cont'd)

Upon motion by Merrill Lynch under Fed. R. Civ. P. 12(b)(6), the district court, relying in part on the decision in *Levitin I*, dismissed Bissell's securities fraud claims for failure to state a claim of fraud "in connection with" the purchase or sale of a security. The court also dismissed each of Bissell's state law claims (including the UCC claim, on the ground that Bissell and Merrill Lynch had *otherwise agreed* to share earnings).[4] As in *Levitin*, the district court did not reach the issue of federal preemption. *Bissell I*, 937 F. Supp. 237, 248-49 (S.D. N.Y. 1996) (Pet App. 47-48a). Judgment was entered for Merrill Lynch, and Bissell appealed.

C. The Consolidated Appeals

Appeals were consolidated in *Levitin* and *Bissell* and argued together before the same panel of the court of appeals. The court issued its primary opinion in *Levitin*, and on the same date an opinion in *Bissell* that briefly noted the factual differences between the two cases and held that neither would prevent Bissell's claims from being dismissed for the reasons stated in *Levitin II*. *See Bissell II*, 157 F.3d at 138-39 (Pet. App. 23a).

(Cont'd)

box." Moreover, unlike a regular short seller, the short seller "against the box" may borrow up to 95% of the proceeds against the security of the long position, repayable when the seller covers his short position. *See* New York Stock Exchange Rule 431(e)(1), NYSE Guide (CCH) ¶ 2431(e)(1) (1994). The short seller is charged interest on such loan by his brokerage firm.

4. Pursuant to that agreement with Merrill Lynch, Bissell received over $44,000 in 1989 alone. *See Bissell I*, 937 F. Supp. at 240-41, 248-49 (Pet. App. 29a, 48a). Petitioners do not challenge the lower courts' findings that Bissell had "otherwise agreed" with Merrill Lynch regarding the proceeds of the short sale, thus placing him outside the terms of U.C.C. § 9-207(2)(c).

The court in *Levitin II* affirmed the district court's dismissal of petitioner's federal securities fraud claim, but on different grounds from those articulated by the lower court. First and foremost, it held that the element of deception, a necessary ingredient of any Section 10(b) claim, was missing; as a matter of law, the appeals court ruled, any "reasonable investor" would have to know that collateral could produce income or other financial benefits, and thus the customer could not be deceived by non-disclosure of the brokerage firm's traditional practice of retaining these gains for its own benefit. *Levitin II*, 159 F.3d at 702-04 (Pet. App. 7-11a).[5] Next, the court of appeals held that, to the extent petitioner's Section 10(b) claim could be construed as a failure to alert petitioner to facts allegedly giving rise to a state law remedy under the UCC, the claim was additionally deficient because any such right under the UCC was preempted through operation of the extensive federal regulation of short sales and margin transactions. *See id.* at 704-07 (Pet. App. 11-19a).[6] Finally, to the extent that petitioner's federal claim of fraud might be construed as alleging that PaineWebber failed to disclose that it would negotiate with large customers to remit a portion of its earnings — *e.g.*, as Merrill Lynch had done with Bissell — the court of appeals found that claim to be deficient because petitioner had not alleged that she was a large customer who could have negotiated such a remittance in any event. *See id.* at 707-08 (Pet. App. 20-21a).

On the authority of *Levitin II*, the court of appeals affirmed the dismissal of the complaint in *Bissell*, but specifically noted in *Bissell II* that, as the district court had found, Bissell had been able to negotiate his own agreement with Merrill Lynch concerning a sharing of earnings from his short sale collateral:

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5. Neither petitioner seeks review of this holding.

6. The preemption portion of this ruling is the sole issue on which review is sought.

> Bissell was a large trader who was able to *negotiate* a remittance of the earnings realized by appellees [Merrill Lynch] on the shares he posted as collateral.

Bissell II, 157 F.3d at 138-39 (Pet. App. 23a; emphasis added). Bissell does not challenge this finding. (Pet. 13, n.4).

REASONS FOR DENYING THE WRIT

1. The petition does not raise any question warranting the Court's review on a writ of certiorari. The petition points to no conflict between the decisions below and any decision of any other United States court of appeals or state court of last resort. Nor does it challenge the court of appeals' articulation of the governing principles of the law of preemption. The petition merely disputes the application of the properly stated law governing federal preemption to two particular sets of facts. Finally, the petition does not raise any substantial argument that the decisions below conflict with any controlling precedent of this Court.

2. Moreover, the court of appeals' application of well-settled preemption principles *was* correct. Petitioners' state law claims, if credited, would rewrite a detailed federal regulatory scheme and impermissibly alter its intended economic effects.

3. In any event, the petition should be denied because an opinion of the Court on the preemption issue would not affect either of the dismissals below. As to petitioner Levitin, the court of appeals' unchallenged finding that there was no deception as a matter of law is fatal to petitioner's Section 10(b) claim in all its forms, and because there exists no independent basis for jurisdiction over petitioner's state law claims, dismissal of the complaint was unarguably proper. Similarly, any opinion on preemption would not alter the dismissal and judgment in

Bissell. The finding of the court of appeals — unchallenged in the petition — that petitioner Bissell "was able to negotiate a remittance of the earnings" in question, *i.e., otherwise agreed* with respondent Merrill Lynch, renders his UCC claim academic at this juncture of the litigation.

ARGUMENT

I.

THE PETITION DOES NOT RAISE ANY ISSUE WORTHY OF THE COURT'S CONSIDERATION.

A. The Petition Seeks Review Solely of the Application of a Properly Stated Rule of Law.

Rule 10 of this Court makes clear that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." The petition does not dispute that the court of appeals properly stated the law governing federal preemption. In fact, the petition cites to the same authorities and standards that the court of appeals relied upon in articulating the legal principles applicable to preemption. *Compare* Pet. 7 *with Levitin II*, 159 F.3d at 705 (Pet. App. 14a). The petition disputes only the court of appeals' application of properly stated preemption principles.

B. There is No Conflict of Decisions.

In its attempt to manufacture a conflict of decisions, the petition refers generally to inapposite authorities while ignoring cases where this Court recently declined review of similar claims. Most notably, the petition suggests that the Second Circuit's decision is at odds with the First Circuit's analysis in *SEC v. Lehman Bros., Inc.*, 157 F.3d 2 (1st Cir. 1998). There is

no such conflict. In *Lehman Brothers*, the SEC had sought a preliminary injunction in an enforcement action. Lehman objected on the grounds that the attached assets were subject to its prior valid security interest. Granting the injunction, the district court found that Lehman was not a bona fide purchaser under New York's UCC. *See SEC v. Pinez*, 989 F. Supp. 325, 339-44 (D. Mass. 1997), *rev'd sub nom., SEC v. Lehman Bros., Inc.*, 157 F.3d 2 (1st Cir. 1998). On appeal, both the SEC and Lehman agreed that the question of whether Lehman was a "bona fide purchaser" was governed by U.C.C. Article 8. The First Circuit found that there was no conflict between Article 8 and the lien provisions of Section 29 of the Exchange Act, 15 U.S.C. § 78cc, which void fraudulent securities contracts. *See Lehman Bros.*, 157 F.3d at 7-9. As the Second Circuit noted in *Levitin II,* Article 8, unlike the general language of Article 9, is explicitly aimed at the securities transfer process. *Levitin II*, 159 F.3d at 704, n.9 (Pet. App. 13a, n.9). The undisputed and intended application of U.C.C. Article 8 to securities transfers, unlike the application of U.C.C. § 9-207 to detailed margin requirements, did not conflict with any federal regulatory scheme.

The petition also cites the Court's recent decision in *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925 (1998), as a basis for granting a writ in this matter. In *Phillips*, the Court found a property interest for purposes of the Fifth Amendment Takings Clause in the common law principle that "interest follows principal." *Id.* at 1930 (Pet. 4). No conflict between state and federal law was asserted in that case.[7]

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7. Moreover, even the state law principles at issue in *Phillips* do not apply here. The parties in *Phillips* had stipulated that "the principal held in IOLTA trust accounts is the 'private property' of the client . . . *freely available* to the client on demand." *Id.* at 1929 (emphasis added). In the instant litigation, the short sale collateral was not "freely available [to petitioners] on demand." To the contrary, collateral of a short sale

(Cont'd)

The petition also ignores a line of preemption cases in which state appellate courts have addressed claims similar to the one at bar. In *Estate of Braunstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 657 N.Y.S. 2d 12 (N.Y. App. Div.), *app. dismissed*, 686 N.E. 2d 1366, *app. denied*, 691 N.E. 2d 630 (N.Y. 1997), *cert. denied*, 118 S. Ct. 1798 (1998), for example, petitioners brought state common law claims seeking return of interest or other profits earned by securities broker-dealers on customer free credit balances. The New York appellate court held that these claims were preempted, finding that a federal regulatory scheme consisting of many of the provisions at issue here[8] would be "severely compromised" if securities brokers were compelled to pay interest on funds that they were otherwise free, under federal regulation, to use in their businesses. *See Estate of Braunstein*, 657 N.Y.S. 2d at 13. This Court denied certiorari in that case less than a year ago.[9]

(Cont'd)
must remain in place with the brokerage firm until the short position is closed. (In case of a short sale "against the box," 95% of the proceeds may be borrowed by the short seller, who pays interest on such loans. *See supra* note 3.) Only after the short position is closed does a short seller receive a portion of the collateral, if any, free and clear, assuming there is an excess over the amount needed to effect the covering transaction.

8. The court in *Estate of Braunstein* relied upon the same SEC rules relating to use of customer credit balances, adopted pursuant to the Commission's authority under 15 U.S.C. § 78o(c)(3), that are at issue in this case. Because the customer credit balances in *Estate of Braunstein* were not encumbered by a security interest in a short position and were thus the unfettered property of the customers, however, the additional SEC interpretations and Federal Reserve Board regulations at issue here were not implicated.

9. The Court has also denied certiorari on three other occasions in the past two terms in cases where Exchange Act regulations led the

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II.

THE COURT OF APPEALS PROPERLY APPLIED PREEMPTION.

The petition's sole contention is that the court of appeals incorrectly applied undisputed principles of preemption law. In fact, the preemption of U.C.C. § 9-207 by federal regulation was articulated properly and in great detail by the Second Circuit in its opinion in *Levitin II*. The federal regulatory scheme governing short sales, margin lending, and use of customer funds by brokers is "pervasive," including disclosure requirements, restrictions on extensions of credit, and restrictions on and permission for use of customer assets, including short sale collateral, in the brokerage business. *See Levitin II*, 159 F.3d at 700-01, 703 n.6, 705-07 (Pet. App. 4a-5a, 10a n.7, 14a-19a). Short sales and margin lending are extensively regulated both by the SEC and by the Federal Reserve Board, and brokerage firms must remain in continuous compliance with SEC rules relating to custody and use of customer funds.[10]

(Cont'd)
highest court of a state to find preempted various common law claims brought against securities brokerage firms. *See Orman v. Charles Schwab & Co.*, 688 N.E. 2d 620 (Ill. 1997), *cert. denied*, 118 S. Ct. 1518 (1998); *Guice v. Charles Schwab & Co.*, 674 N.E. 2d 282 (N.Y. 1996), *cert. denied*, 117 S. Ct. 1250 (1997); *Dahl v. Charles Schwab & Co.*, 545 N.W. 2d 918 (Minn.), *cert. denied*, 117 S. Ct. 176 (1996). The New York courts decided *Estate of Braunstein* and *Rosenfeld v. Bear, Stearns & Co.* on the authority of *Guice*. *See Rosenfeld v. Bear, Stearns & Co.*, 655 N.Y.S. 2d 473, 473-74 (N.Y. App. Div.) (settlement of class action involving stock lending approved over objections of, among others, petitioner Bissell on the grounds that, *inter alia*, the likelihood of success on the merits was highly questionable in light of the defendants' pending motion to dismiss on preemption grounds), *app. dismissed*, 684 N.E. 2d 282, *app. denied*, 688 N.E. 2d 1382 (N.Y. 1997).

10. The SEC asserted, in adopting Rule 15c3-3, that it intended the Rule to be "comprehensive" and uniform in its application. *See*
(Cont'd)

Petitioners' argument that U.C.C. § 9-207(2)(c) and these federal regulations are not in conflict is wrong. Under § 9-207(2)(c), an agreement between the pledgor (here, the short seller) and his or her pledgee (here, the brokerage firm) is necessary to permit the latter to keep all or any part of its earnings from the use of the collateral. On the other hand, under SEC regulations a brokerage firm may use such funds — along with other customer funds — for its own exclusive benefit under Rule 15c3-3 without prior customer permission or agreement, and *the customer* must negotiate for the added benefit of earning interest on collateral. The court of appeals properly recognized that this distinction in the default rules has a profound economic impact on the business of short selling:

> [r]egulation by the states would directly affect the very value of security posted pursuant to federal margin requirements. A secured lender who may retain earnings on collateral has more valuable security than a lender who must remit to the customer interest on the collateral.

(Cont'd)

Adoption of Rule 15c3-3, Exchange Act Release No. 34-9856, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,083 at 82,346 (Nov. 13, 1972). This determination is clearly in line with numerous acts of Congress aimed at providing greater uniformity in the securities industry nationwide. *See, e.g.*, Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353 (1998) (preempting certain state law causes of action arising out of securities markets); National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290 (1996) (adding, *inter alia*, a new section 15(h) to the Exchange Act, 15 U.S.C. § 78o(h)(1), prohibiting states from regulating certain aspects of broker-dealers' businesses, including "capital, custody, [and] margin" requirements); *Guice, supra*, 674 N.E. 2d at 286-88, 289-90 (describing 1975 amendments to Exchange Act, and 1994 SEC regulations thereunder, as intended to create a "national market system for securities and a national system for the clearance and settlement of securities transactions").

Levitin II, 159 F.3d at 706 (Pet. App. 17a). Petitioners cite nothing to support their challenge to this critical finding. *See* Pet. 12.

The court of appeals' reading of SEC regulations is confirmed by SEC No-Action letters which point out that a brokerage firm *may* agree — but is *not* required — to share its earnings from short sale collateral. *See Levitin II*, 159 F.3d at 701, 703 n.7, 706-07 & n.12 (collecting SEC statements) (Pet. App. 5a, 10a n.7, 18a & n.12).[11] It is further supported by the SEC Releases accompanying the promulgation of the rules themselves.[12] Applying U.C.C. § 9-207(2)(c) to short sales would

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11. Contrary to petitioners' suggestion, the SEC No-Action letters cannot be read to support the proposition that the use of short sale collateral is governed by state law. Had that been the SEC's position, the letters would have said as much — *e.g.*, "absent agreement, any profits earned on the collateral belong to the customer." Instead, in response to customers who were seeking the earnings on collateral for themselves, the SEC letters state that the sharing of those earnings is a matter for negotiation — *i.e.*, that the customer must take *affirmative steps* to bargain for some or all of the interest to be earned on her collateral.

12. *See Bissell I*, 937 F. Supp. at 246-47 ("the relationship between the broker-dealer and the customer [with respect to credit balances] *is that of creditor-debtor*" (*quoting Adoption of Rule 15c3-2*, Exchange Act Release No. 34-7325, [1961-1964 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,000 at 81,668 (May 27, 1964) (emphasis added by the court))) (Pet. App. 43a). *Accord Proposed Rule 15c3-2*, Exchange Act Release No. 34-7266, [1961-64 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,978 at 81,622 (Mar. 12, 1964). In a comprehensive 1963 study of the securities industry, the SEC recognized that customer credit balances (including collateral for short sales) "generally . . . can be used interest-free [footnote omitted]." *See SEC, Report of Special Study of Securities Markets*, H. Doc. No. 95, 88th Cong., 1st Sess., Pt. 1, at 393-94 (1963). Indeed, in enacting the disclosure provisions of Rule 15c3-2 the (Cont'd)

stand SEC regulations and industry practices on their head, requiring the payment of such earnings to the short seller unless he or she has waived the receipt of the earnings or a portion thereof in a prior agreement with the brokerage firm.

As the court of appeals noted, the SEC has generally followed a "policy of relying on competition to determine the economics of broker-client relationships." *Levitin II*, 159 F.3d at 707 (Pet. App. 18a). That policy would be frustrated by subjecting federally mandated collateral requirements and federally permitted uses of funds to state laws redirecting the benefits from such uses. And, as the court of appeals recognized, "Levitin's argument is not limited to state regulation that can be varied by private contract." *Levitin II*, 159 F.3d at 706, n.11 (Pet. App. 16a, n.11). Particular parties can always contract out of the default rule, and there is nothing in federal law or policy to prevent them from so doing; indeed, petitioner Bissell and respondent Merrill Lynch did just that. *See Bissell I*, 937 F. Supp. 237, 248-49 (Pet. App. 48a); *Bissell II*, 157 F.3d at 138-39 (Pet. 23a).

(Cont'd)

following year, the SEC rejected an earlier version of the Rule that would have required disclosure of whether or not interest would be paid on customer credit balances. *See Adoption of Rule 15c3-2*, ¶ 77,000 at 81,668. When the SEC revisited the issue in 1972 to enact Rule 15c3-3, it considered but ultimately rejected the approach of requiring free credit balances to be held in segregated trust accounts, explaining that it "sought to avoid freezing the liquid resources of the securities industry or *depriving it of business opportunities in areas, such as margin lending, where it has traditionally played a significant and constructive role.*" *Proposal to Adopt Rule 15c3-3*, No. 34-9622, [1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,801 at 81,729-30 (May 31, 1972) (emphasis added).

III.

ANY OPINION OF THE COURT ON THE QUESTION PRESENTED IN THE PETITION WOULD BE ADVISORY.

Where an opinion of the Court plainly would not affect the outcome of the action on remand, certiorari should not be granted. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 181 (1959). For separate but similar reasons, resolution of the preemption question would not affect the outcome of either of these cases, and the Court should accordingly decline to issue an advisory opinion in either *Levitin* or *Bissell*.

A. Any Opinion on Preemption Would Merely Be Advisory as to *Levitin*.

Certiorari should be denied in *Levitin v. PaineWebber* because granting review would result, at most, in an advisory opinion that would not affect the dismissal of petitioner Levitin's claims below.

The court of appeals' discussion of preemption in the *Levitin* opinion was prompted solely by its consideration of an argument asserted first at oral argument on appeal — namely, that by failing to disclose its retention of earnings on collateral, PaineWebber had failed to alert petitioner to facts giving rise to the deprivation of her rights under New York law, and thus violated Section 10(b) of the Exchange Act by virtue of the so-called "loss-of-state-law-remedies" doctrine. *Levitin II*, 159 F.3d at 704 (Pet. App. 6a, 11a-12a).

For at least two reasons wholly unrelated to preemption, however, petitioner has no "loss-of-state-law-remedies" Section 10(b) claim to assert. First, the doctrine is a narrow one, limited to cases where the defendant's deception deprived petitioner

irretrievably of a state law *remedy* she otherwise would have had the opportunity to seek. *See Field v. Trump*, 850 F.2d 938, 948 (2d Cir. 1988) (requiring allegation of lost opportunity to prevent conduct causing irreparable injury), *cert. denied*, 489 U.S. 1012 (1989). Here, in contrast, Levitin cannot point to any remedy "lost" as a result of the alleged deception; on the contrary, her complaint explicitly alleges state law damages claims for the very conduct at issue.

Second, the purported deception on which any such hybrid state law/Section 10(b) claim would rest — PaineWebber's failure to disclose its retention of the customer's interest — is negated by the Second Circuit's holding that *there simply was no deception*; as a matter of law, the court ruled, no reasonable investor could fail to appreciate that "money has a time value" and "a brokerage can earn profits from funds deposited with it as security for short sale transactions." *Levitin II*, 159 F.3d at 702 (Pet. App. 8a). That ruling, fatal to petitioner's federal securities fraud claim in any of its guises, stands unchallenged by both petitioners.

In short, a different view of preemption would in no way alter the conclusion that Levitin was not deceived by PaineWebber's conduct, that she therefore has no federal securities law claim against PaineWebber, and that the pendent state law claims were properly dismissed by the district court for lack of subject matter jurisdiction. Where, as here, an opinion on preemption plainly would not affect the outcome of the action on remand, certiorari should not be granted. *See The Monrosa*, 359 U.S. at 181.

B. The U.C.C. § 9-207(2)(c) Claim in *Bissell* Fails on State Law Grounds.

In *Bissell*, petitioner has no state law claim at this juncture even if his claim is not preempted; the district court held, and the court of appeals concurred, that he had "otherwise agree[d]"

within the meaning of U.C.C. § 9-207(2)(c) when he negotiated an agreement with Merrill Lynch regarding the remittance of the earnings from his short sale collateral. Bissell thus contracted out of that provision. *See Bissell I*, 937 F. Supp. 237, 248-49 (Pet. App. 48a); *Bissell II*, 157 F.3d at 138-39 (Pet. App. 23a). Bissell does not seek review of that finding. Accordingly, whether or not federal regulation preempts U.C.C. § 9-207(2)(c) would have no effect on the outcome of *Bissell*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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